

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GARY CLARENCE MORTON, JR.,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

NO: 2:15-CV-34-RMP

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND REMANDING  
FOR FURTHER PROCEEDINGS

BEFORE THE COURT are Plaintiff Gary Clarence Morton, Jr.'s Motion for Summary Judgment, **ECF No. 15**, and Defendant Commissioner of Social Security Carolyn W. Colvin's Motion for Summary Judgment, **ECF No. 20**. The Court has reviewed the motions, the reply memorandum (ECF No. 21), the administrative record, and is fully informed.

**BACKGROUND**

Gary Clarence Morton, Jr. protectively filed an application for Disability Insurance Benefits (DIB) on June 3, 2012. ECF No. 11-2 at 14, Tr. 13. Mr. Morton alleged disability beginning March 17, 2011. *Id.* Mr. Morton's application was

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1 denied initially on July 12, 2012, and upon reconsideration on September 25, 2012.  
2 *Id.* Mr. Morton requested a hearing, which was held via video conference before  
3 Administrative Law Judge (“ALJ”) Caroline Siderius on November 6, 2012. *Id.*  
4 Mr. Morton was present and represented by counsel David L. Lybbert. *Id.* The ALJ  
5 heard testimony from medical expert Anthony E. Francis, M.D., and vocational  
6 expert (“VE”) Diane Kramer. *Id.*

7 The ALJ found that Mr. Morton had not engaged in substantial gainful work,  
8 as defined in 20 C.F.R. § 404.1572(a), during the period from his alleged onset  
9 date of March 17, 2011, through his date of last insured of September 30, 2011.  
10 ECF No. 11-2 at 16, Tr. 15. Further, the ALJ found that Mr. Morton had the  
11 following severe impairments as defined by 20 C.F.R. § 404.1520(c): degenerative  
12 disc disease of the cervical spine, and chronic neck and back pain. *Id.*

13 However, the ALJ found that Mr. Morton did not have an impairment or  
14 combination of impairments that met or medically equaled the severity of one of  
15 the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R.  
16 §§ 404.1520(d), 404.1525, and 404.1526). ECF No. 11-2 at 17, Tr. 16. The ALJ  
17 further found that Mr. Morton had the residual functional capacity (“RFC”) to  
18 perform light work as defined in 20 CFR 404.1567(b) subject to the  
19 following limitations. He is able to lift and/or carry ten pounds  
20 frequently and twenty pounds occasionally. He is able to sit, stand,  
21 and/or walk up to six hours in an eight-hour workday with normal  
breaks. He is able to perform work that includes a sit/stand option. He  
is able to perform work with occasional overhead reaching bilaterally.  
He is able to perform work that does not include climbing of ladders,

1 ropes, or scaffolds. He is able to perform work that includes frequent  
2 stooping, crawling, and climbing of stairs or ramps. He is able to  
3 perform work that avoids concentrated exposure to vibration, heavy  
4 machinery, or equipment. He is able to perform work that avoids  
5 repetitive turning of the head in all directions.

6 ECF No. 11-2 at 17–18, Tr. 16–17.

7 Given Mr. Morton’s age, education, work experience, and RFC, the VE  
8 testified that there were a number of jobs available in the national economy for an  
9 individual sharing his characteristics. ECF No. 11-2 at 22, Tr. 21. The ALJ then  
10 found that “the claimant was capable of making a successful adjustment to other  
11 work that existed in significant numbers in the national economy.” ECF No. 11-2  
12 at 23, Tr. 22. The ALJ concluded that Mr. Morton was not under a disability as  
13 defined by the Social Security Act. *Id.* Mr. Morton’s application was denied on  
14 December 6, 2013. *Id.*

15 Mr. Morton filed a request for review by the Appeals Council, which was  
16 denied on December 16, 2014. ECF No. 11-2 at 2, Tr. 1. As part of his request for  
17 review, Mr. Morton submitted additional medical evidence to the Appeals Council.  
18 ECF No. 11-2 at 3, Tr. 2. The Appeals Council found that “[t]he Administrative  
19 Law Judge decided your case through September 30, 2011, the date you were last  
20 insured for disability benefits. This new information is about a later time.  
21 Therefore, it does not affect the decision about whether you were disabled at the  
time you were last insured for disability benefits.” *Id.*

1 Mr. Morton then filed a complaint in the District Court for the Eastern  
2 District of Washington on February 4, 2015, ECF No. 1, and the Commissioner  
3 answered the complaint on May 1, 2015. ECF No. 10. This matter is therefore  
4 properly before the Court pursuant to 42 U.S.C. § 405(g).

### 5 **STATEMENT OF FACTS**

6 The facts of this case are set forth in the administrative hearing transcripts  
7 and record, ECF No. 11. Mr. Morton was 51 years old when he applied for DIB  
8 and 53 years old at the hearing. *See* ECF No. 11-2 at 14, Tr. 13. Mr. Morton has  
9 past relevant work experience as a warehouse worker, industrial truck operator,  
10 and construction worker. ECF No. 11-2 at 21, Tr. 20.

### 11 **STANDARD OF REVIEW**

12 Congress has provided a limited scope of judicial review of a  
13 Commissioner's final decision. 42 U.S.C. § 405(g). A reviewing court must uphold  
14 the Commissioner's decision, determined by an ALJ, when the decision is  
15 supported by substantial evidence and not based on legal error. *See Jones v.*  
16 *Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). Substantial evidence is more than a  
17 mere scintilla, but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d  
18 1112, 1119 n.10 (9th Cir. 1975). Substantial evidence "means such relevant  
19 evidence as a reasonable mind might accept as adequate to support a conclusion."  
20 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation omitted).

1 The reviewing court should uphold “such inferences and conclusions as the  
2 [Commissioner] may reasonably draw from the evidence.” *Mark v. Celebrezze*,  
3 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a  
4 whole, not just the evidence supporting the Commissioner’s decision. *Weetman v.*  
5 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *see also Green v. Heckler*, 803 F.2d 528,  
6 530 (9th Cir. 1986) (“This court must consider the record as a whole, weighing  
7 both the evidence that supports and detracts from the [Commissioner’s]  
8 conclusion.”). “[T]he key question is not whether there is substantial evidence that  
9 could support a finding of disability, but whether there is substantial evidence to  
10 support the Commissioner’s actual finding that claimant is not disabled.” *Jamerson*  
11 *v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997).

12 It is the role of the trier of fact, not the reviewing court, to resolve conflicts  
13 in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one  
14 rational interpretation, the reviewing court may not substitute its judgment for that  
15 of the Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Thus,  
16 if there is substantial evidence to support the administrative findings, or if there is  
17 conflicting evidence that will support a finding of either disability or nondisability,  
18 the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226,  
19 1229–30 (9th Cir. 1987).

## 20 SEQUENTIAL PROCESS

21 Under the Social Security Act (the “Act”),

1 an individual shall be considered to be disabled . . . if he is unable to  
2 engage in any substantial gainful activity by reason of any medically  
3 determinable physical or mental impairment which can be expected to  
result in death or which has lasted or can be expected to last for a  
continuous period of not less than 12 months.

4 42 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be  
5 determined to be under a disability only if his impairments are of such severity that  
6 the claimant is not only unable to do his previous work but cannot, considering the  
7 claimant's age, education, and work experience, engage in any other substantial  
8 gainful work which exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).  
9 "Thus, the definition of disability consists of both medical and vocational  
10 components." *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001).

11 The Commissioner has established a five-step sequential evaluation process  
12 for determining whether a claimant is disabled. 20 C.F.R. § 404.1520(a)(4). Step  
13 one determines if the claimant is engaged in substantial gainful activities. If the  
14 claimant is engaged in substantial gainful activities, benefits are denied. 20 C.F.R.  
15 § 404.1520(a)(4)(i).

16 If the claimant is not engaged in substantial gainful activities, the ALJ, under  
17 step two, determines whether the claimant has a medically severe impairment or  
18 combination of impairments. If the claimant does not have a severe impairment or  
19 combination of impairments, the disability claim is denied. 20 C.F.R.  
20 § 404.1520(a)(4)(ii).

1 If the impairment is severe, the evaluation proceeds to step three, which  
2 compares the claimant's impairment to a number of listed impairments  
3 acknowledged by the Commissioner to be so severe as to preclude substantial  
4 gainful activity. 20 C.F.R. § 404.1520(a)(4)(iii); *see also* 20 C.F.R. § 404,  
5 Subpt. P, App. 1. If the impairment meets or equals one of the listed impairments,  
6 the claimant is conclusively presumed to be disabled. 20 C.F.R.  
7 § 404.1520(a)(4)(iii).

8 Before proceeding to step four, the claimant's RFC is assessed. 20 C.F.R.  
9 § 404.1545(a)(1). An individual's RFC is the ability to do physical and mental  
10 work activities on a sustained basis despite limitations from any impairments. *Id.*

11 If the impairment is not one conclusively presumed to be disabling, the  
12 evaluation proceeds to step four, where the ALJ determines whether the  
13 impairment prevents the claimant from performing work he has performed in the  
14 past. If the claimant is able to perform his previous work, the claimant is not  
15 disabled. 20 C.F.R. § 404.1520(a)(4)(iv).

16 If the claimant cannot perform his previous work, the final step considers  
17 whether the claimant is able to perform other work in the national economy in light  
18 of his RFC, age, education, and past work experience. 20 C.F.R.  
19 § 404.1520(a)(4)(v).

20 At step five, the initial burden of proof rests upon the claimant to establish a  
21 prima facie case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d

1 920, 921 (9th Cir. 1971). The claimant satisfies this burden by establishing that a  
2 physical or mental impairment prevents him from engaging in his previous  
3 occupation. The burden then shifts to the Commissioner to show that (1) the  
4 claimant can perform other substantial gainful activity and (2) a “significant  
5 number of jobs exist in the national economy” which the claimant can perform.  
6 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

## 7 ISSUES

8 Mr. Morton asserts that the ALJ committed reversible error by: (1) failing to  
9 consider, under step two, whether Mr. Morton’s right shoulder nerve impingement  
10 constitutes a severe impairment; (2) improperly finding that Mr. Morton lacked  
11 credibility; and (3) failing to conduct an adequate step five analysis. ECF No. 15.  
12 Further, Mr. Morton alleges that the Appeals Council erred when declining to  
13 consider Mr. Morton’s additional evidence. *Id.*

## 14 DISCUSSION

### 15 I. Additional Evidence Submitted to the Appeals Council

16 Mr. Morton asserts that the Appeals Council improperly rejected additional  
17 medical evidence that related back to the disability time period considered by the  
18 ALJ. *Id.* at 15. Mr. Morton submitted the relevant record, a medical opinion by  
19 Dr. Jason M. Grosdidier, as an attachment to his motion. ECF No. 15-1. The  
20 Commissioner argues that the Court should not consider Mr. Morton’s extraneous  
21 evidence as (1) the Appeals Council did not “consider” the additional evidence as



1 required by *Brewes v. Comm’r of Soc. Sec. Admin*, 682 F.3d 1157 (9th Cir. 2012);  
2 (2) the Appeals Council properly declined to review the additional evidence as it  
3 did not concern the relevant disability timeframe; and (3) Mr. Morton cannot  
4 satisfy the requirements for a 42 U.S.C. § 405(g) “Sentence Six” remand  
5 demanded when a claimant submits new evidence. ECF No. 20 at 14–18. In  
6 conjunction, the Commissioner moves to strike Dr. Grosdidier’s medical opinion  
7 attached to Mr. Morton’s motion. *Id.* at 14.

8 As noted above, the Appeals Council denied Mr. Morton’s request for  
9 review on December 16, 2014. ECF No. 11-2 at 2, Tr. 1. In denying Mr. Morton’s  
10 request for review, the Appeals Council noted that

11 [w]e also looked at The Center records dated March 12, 2014 to March  
12 24, 2014 (3 pages), records by Jason Grossdidier [*siq*] dated April 11,  
13 2014 (3 pages), DSHS physical evaluation dated March 27, 2014 (5  
14 pages), DSHS psychological evaluation dated April 22, 2014 (4 pages),  
15 Columbia Valley Community Health records dated March 6, 2014 (2  
16 pages), and Confluence Health records dated July 14, 2014 (3 pages).  
The Administrative Law Judge decided your case through September  
30, 2011, the date you were last insured for disability benefits. This new  
information is about a later time. Therefore, it does not affect the  
decision about whether you were disabled at the time you were last  
insured for disability benefits.

17 ECF No. 11-2 at 3, Tr. 2.

18 While the Court may review the final decisions of the Commissioner of  
19 Social Security, 42 U.S.C. § 405(g), the Court does “not have jurisdiction to  
20 review a decision of the Appeals Council denying a request for review of an ALJ’s  
21 decision, because the Appeals Council decision is a non-final agency action.”

1 *Brewes*, 682 F.3d at 1161. However, the Court reviews the administrative record,  
2 which “includes evidence submitted to and considered by the Appeals Council.”  
3 *Id.* at 1162. “If new and material evidence is submitted, the Appeals Council shall  
4 consider the additional evidence only where it relates to the period on or before the  
5 date of the administrative law judge hearing decision.” 20 C.F.R. § 404.970(b).  
6 Such evidence, when considered by the Appeals Council, “becomes part of the  
7 administrative record.” *Brewes*, 682 F.3d at 1163.

8 It is improper for the Appeals Council to reject additional evidence where  
9 the Appeals Council erroneously concludes that the evidence is only relevant to a  
10 time period subsequent to that considered by the ALJ. *Taylor v. Comm’r of Soc.*  
11 *Sec. Admin.*, 659 F.3d 1228, 1232 (9th Cir. 2011). “Where the Appeals Council  
12 was required to consider additional evidence, but failed to do so, remand to the  
13 ALJ is appropriate so that the ALJ can reconsider its decision in light of the  
14 additional evidence.” *Id.* at 1233.

15 Mr. Morton contends that the Appeals Council improperly rejected Dr. Jason  
16 Grosdidier’s medical opinion. As noted above, the Appeals Council found that the  
17 additional evidence, including Dr. Grosdidier’s record, “is about a later time” than  
18 that considered by the ALJ. ECF No. 11-2 at 3, Tr. 1. However, Dr. Grosdidier  
19 noted that Mr. Morton’s neck and back pain symptoms “appeared to stem from a  
20 motor vehicle accident which he sustained in March of 2011.” ECF No. 15-1 at 1.  
21 Further, Dr. Grosdidier concluded that Mr. Morton demonstrated “objective

1 worsening of his cervical dorsal spine, throughout 2011 and through 2013.” *Id.* at  
2 3. While Dr. Grosdidier also discussed Mr. Morton’s condition through 2013, *see*  
3 *id.*, the Court finds that the Appeals Council erred in finding that Dr. Grosdidier’s  
4 opinion was not relevant to Mr. Morton’s disability status between March 17,  
5 2011, and September 30, 2011. *Accord Ward v. Colvin*, No. 2:13-cv-1390-EFB,  
6 2014 WL 4925274, at \*4 (E.D. Cal. Sept. 30, 2014) (remanding where “the  
7 Appeals Council refused to consider the [additional evidence] based on its  
8 mistaken conclusion that it only pertained to a later period that was not relevant”).

9 As this matter is controlled by *Taylor*, the Commissioner’s arguments  
10 concerning *Brewes* are unpersuasive. As noted by the Commissioner, *Brewes*  
11 addressed the status, in relation to the record on appeal, of additional evidence  
12 properly considered by the Appeals Council. *See* ECF No. 20 at 16. Here,  
13 however, the Appeals Council improperly rejected the additional evidence,  
14 rendering *Taylor* the appropriate controlling precedent.

15 The Commissioner also argues that consideration of Dr. Grosdidier’s report  
16 is barred by 42 U.S.C. § 405(g) “Sentence Three,” which states that “[a]s part of  
17 the Commissioner’s answer the Commissioner of Social Security shall file a  
18 certified copy of the transcript of the record including the evidence upon which the  
19 findings and decision complained of are based.” 42 U.S.C. § 405(g). The  
20 Commissioner argues that “Sentence Three” “gives the Commissioner of Social  
21

1 Security the sole authority to create and file the certified transcript of the record.”

2 ECF No. 20 at 17.

3       The Court finds that the instant scenario, which asserts reversible error based  
4 on the Appeals Council’s (and by extension the Commissioner’s) improper  
5 rejection of additional evidence, is by necessity outside the scope of “Sentence  
6 Three.” Following the Commissioner’s reasoning, a challenge, such as that raised  
7 in *Taylor*, would never be cognizable as the improperly rejected evidence would  
8 be, by virtue of its rejection, outside the official record. Where the challenge  
9 concerns an alleged improper omission from the record, the Court declines to adopt  
10 the Commissioner’s circular reasoning requiring such evidence to be included in  
11 the record to be considered. Further, as Mr. Morton’s challenge was explicitly  
12 recognized in *Taylor*, the Court finds the Commissioner’s objection unpersuasive.

13       Finally, the Commissioner argues that, as Dr. Grosdidier’s report is “new”  
14 evidence, Mr. Morton must satisfy 42 U.S.C. § 405(g) “Sentence Six.” ECF No. 20  
15 at 14. Under “Sentence Six,” the Court may “at any time order additional evidence  
16 to be taken before the Commissioner of Social Security, but only upon a showing  
17 that there is new evidence which is material and that there is good cause for the  
18 failure to incorporate such evidence into the record in a prior proceeding.” 42  
19 U.S.C. § 405(g). However, “evidence submitted to and considered by the Appeals  
20 Council is not new but rather is part of the administrative record properly before  
21 the district court.” *Brewes*, 683 F.3d at 1164; *see also Palomares v. Astrue*, 887 F.

1 Supp. 2d 906, 916 (N.D. Cal. 2012) (finding, applying *Brewes*, that “Sentence Six”  
2 is not applicable to additional evidence submitted to the Appeals Council). As the  
3 additional evidence should have been considered by the Appeals Council, the  
4 Court finds that Mr. Morton does not have to satisfy “Sentence Six” in relation to  
5 Dr. Grosdidier’s report.

6 As the Appeals Council improperly rejected Dr. Grosdidier’s report, the  
7 Court remands to the Commissioner to reconsider its decision in light of  
8 Mr. Morton’s additional evidence. *See Taylor*, 659 F.3d at 1235 (noting that  
9 “[b]ecause Dr. Thompson’s psychiatric evaluation and medical source statement  
10 were not considered by the Appeals Council or the ALJ, remand to the ALJ for  
11 further consideration is in order”). On remand, the ALJ must account for Dr.  
12 Grosdidier’s report as part of the five-step sequential process.

## 13 **II. Right Shoulder Nerve Impingement as Severe Impairment**

14 Mr. Morton also asserts that the ALJ committed reversible error by failing to  
15 consider whether his right shoulder nerve impingement constituted a severe  
16 impairment at step two of the sequential process. ECF No. 15 at 8. The  
17 Commissioner argues that, as Mr. Morton has failed to carry his burden to establish  
18 the existence of a severe impairment, the ALJ did not err in omitting any  
19 discussion of Mr. Morton’s right shoulder. ECF No. 20 at 11.

20 A severe impairment is one “which significantly limits your physical or  
21 mental ability to do basic work activities.” 20 C.F.R. § 404.1520(c). Conversely,

1 an impairment is not severe when it is “a slight abnormality (or a combination of  
2 slight abnormalities) that has no more than a minimal effect on the ability to do  
3 basic work activities.” SSR 96-3p, 1996 WL 374181, at \*1 (July 2, 1996).

4 The ALJ found that, while Mr. Morton suffered from severe impairments  
5 concerning degenerative disc disease of the cervical spine and chronic neck and  
6 back pain, Mr. Morton’s anger management issues do “not constitute a severe  
7 impairment.” ECF No. 11-2 at 16–17, Tr. 15–16. The ALJ, however, made no  
8 finding as to whether Mr. Morton’s alleged right shoulder impingement did or did  
9 not constitute a severe impairment.

10 As the ALJ did not consider whether Mr. Morton’s right shoulder nerve  
11 impingement constituted a severe impairment, the Court finds that the ALJ  
12 committed reversible error. *See Black v. Astrue*, No. 11-35379, 2012 WL 907118,  
13 at \*1 (9th Cir. Mar. 19, 2012) (“Substantial evidence does not support the ALJ’s  
14 conclusion that the anxiety disorder is not a severe impairment in the absence of  
15 any mention of the disorder.”). Further, the Court cannot determine whether the  
16 omission was harmless as the ALJ did not provide a rationale for rejecting  
17 evidence potentially relevant to Mr. Morton’s RFC. *See id.* (finding that “therefore  
18 we do not know whether the ALJ’s omission was ‘inconsequential to the ultimate  
19 nondisability determination’”) (quoting *Stout v. Comm’r, Soc. Sec. Admin.*, 454  
20 F.3d 1050, 1055 (9th Cir. 2006)).  
21

1 Although, as noted by the Commissioner, Mr. Morton carries the burden of  
2 establishing a severe impairment, the record contains numerous references to both  
3 the right shoulder nerve impingement as well as related functional limitations. *See*  
4 ECF No. 11-6 at 24, Tr. 196 (Mr. Morton noting that his “[r]ight arm goes numb  
5 and has spasms”); ECF No. 11-6 at 25, Tr. 197 (Mr. Morton noting that “I can’t lift  
6 my arm over my head”); ECF No. 11-6 at 29, Tr. 201 (Mr. Morton noting that  
7 “[m]y right arm is my dominant arm. Not being able to use it hinders a lot of things  
8 I do.”); ECF No. 11-7 at 33, Tr. 256 (physical therapist noting that “[h]e reports he  
9 does have a history of some right shoulder pain. He states that his doctor told him  
10 he had bone spurs in his right shoulder.”). Further, Mr. Morton alleged before the  
11 ALJ that “[h]e has neck and shoulder pain from a herniated disc in his neck. There  
12 are findings of loss of sensation in the right thumb, and complaints of radiating  
13 pain and tingling to the right forearm.” ECF No. 11-4 at 37–38, Tr. 148–49.

14 The Court’s conclusion is bolstered by the ALJ’s discussion of Mr. Morton’s  
15 anger management issues, which were “not specifically alleged by the claimant”  
16 but referred to in the relevant medical records. ECF No. 11-2 at 16, Tr. 15. As  
17 Mr. Morton alleged limitations arising from a right shoulder issue and such an  
18 impairment is referenced in his medical records, the ALJ erred by failing to make  
19 an express finding regarding the severity, or lack thereof, of Mr. Morton’s alleged  
20 right shoulder impairment. The Court finds that remand for further proceedings is  
21

1 appropriate to allow the Commissioner to make the appropriate findings at step  
2 two.

### 3 CONCLUSION

4 As the Court finds that remand for additional findings is appropriate, the  
5 Court need not address Mr. Morton's allegations of error concerning the ALJ's  
6 credibility finding and step five analysis. *See Taylor*, 659 F.3d at 1235 ("Remand  
7 for further proceedings is appropriate where there are outstanding issues that must  
8 be resolved before a disability determination can be made, and it is not clear from  
9 the record that the ALJ would be required to find the claimant disabled if all the  
10 evidence were properly evaluated."). Further, Mr. Morton's request for an  
11 immediate award of benefits is denied as further proceedings are necessary to  
12 develop the record. *See* ECF No. 15 at 18.

13 The Court will, however, briefly discuss the ALJ's credibility finding  
14 concerning Mr. Morton's daily activities. The ALJ found that Mr. Morton's  
15 "activities of daily living also show inconsistencies" and noted general  
16 housekeeping and childcare. ECF No. 11-2 at 20, Tr. 19. The Ninth Circuit "has  
17 repeatedly asserted that the mere fact that a plaintiff has carried on certain daily  
18 activities . . . does not in any way detract from her credibility as to her overall  
19 disability." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

20 While it is correct that the "Social Security Act does not require that  
21 claimants be utterly incapacitated to be eligible for benefits . . . and many home



1 activities are not easily transferable to . . . the workplace,” activities of daily living  
2 may be considered “if a claimant is able to spend a substantial part of his day  
3 engaged in pursuits involving the performance of physical functions that *are*  
4 transferable to a work setting.” *Fair v. Bowen*, 885 F.3d 597, 603 (9th Cir. 1989)  
5 (emphasis in original). However, a claimant’s activities of daily living that require  
6 flexibility regarding rest periods or assistance from other persons are generally not  
7 transferable to a work environment. *See Garrison v. Colvin*, 759 F.3d 995, 1016  
8 (9th Cir. 2014).

9 As noted by the ALJ, Mr. Morton testified that “he may require a rest break  
10 or lean on the counter to complete household chores.” ECF No. 11-2 at 18, Tr. 17.  
11 Further, Mr. Morton “testified that he naps at least once per day to relieve his neck  
12 pain complaints.” *Id.* While the Court declines to reach Mr. Morton’s challenge to  
13 the ALJ’s overall credibility analysis, the ALJ, to find a lack of credibility based  
14 on daily activities on remand, must consider whether Mr. Morton’s housekeeping  
15 and childcare activities are transferable to a work environment, taking into account  
16 Mr. Morton’s need for frequent breaks and rest periods.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Plaintiff’s motion for summary judgment, **ECF No. 15**, is **GRANTED IN**  
19 **PART.**

20 2. Defendant’s motion for summary judgment, **ECF No. 20**, is **DENIED.**

1 3. This case is **REMANDED** for a *de novo* hearing before the Social Security  
2 Administration.

3 4. **UPON REMAND**, the ALJ will conduct a *de novo* hearing and issue a new  
4 decision that is consistent with the applicable law set forth in this Order. The  
5 ALJ will, if necessary, further develop the record, reassess the claimant's  
6 residual functional capacity, obtain supplemental evidence from a vocational  
7 expert, and re-evaluate the claimant's credibility.

8 5. **JUDGMENT** shall be entered for the Plaintiff.

9 The District Court Clerk is hereby directed to enter this Order, enter  
10 judgment accordingly, provide copies to counsel, and to **close this file**.

11 **DATED** this 18th day of March 2016.

12  
13 s/ Rosanna Malouf Peterson  
14 ROSANNA MALOUF PETERSON  
15 United States District Judge  
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